IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPLICATION NO.43 OF 2000

The Commissioner of Central
Excise Mumbai - V, 5th Floor,
Utpad Shulk Bhavan,
Plot NO.C-24, Sector - E,
Bandra Kurla Complex,
Bandra (E), Bombay - 51. .. Applicant.

V/s.

Indabrator Limited,
NSE Compound, Western
Express Highway,
Goregaon (E), Bombay 63. .. Respondent.

Mr.R.V. Desai, senior advocate with Mr.A.S. Rao for the applicant.

Mr.Ajay Panicker for the respondent.

CORAM : V.C. DAGA &
J.P. DEVADHAR, JJ.

DATED : 7TH JUNE, 2006.

P.C. :

Heard learned counsel for the rival parties. Perused application and documents annexed thereto.

2. This Central Excise Application was admitted by this Court on 3rd February, 2005 on the following **substantial question of law:**

> Whether on the facts and in the circumstances of the case, the Tribunal was right in law in deleting the penalty imposed on the assessee under Rule 173Q of the Central Excise Rules, 1944, without appreciating the fact had the change in classification made by the assessee

gone unnoticed the Revenue would have suffered a loss of Rs.15,00,000/- ?

THE FACTS :

3. This Central Excise Application at the instance of the Revenue arises from the order of the Customs Excise and Service Tax Appellate Tribunal ('the Tribunal' for short) dated 17th February, 2000; whereby the order imposing penalty by the authority in original affirmed by the first appellate authority came to be set aside holding that an attempt to change in classification in order to obtain benefit available in law is not punishable under the Central Excise Act and Rules.

THE SUBMISSION :

4. Mr.R.V. Desai, learned senior counsel appearing for the Revenue finding fault with the view taken by the Tribunal submits that an attempt on the part of the respondent - assessee to change the heading of classification with a view to grant benefits in favour of its customers by itself is in breach of Rule 173Q (bbb) and (d) of the Central Excise Rules, 1944 ('the Rules' for short)

STATUTORY PROVISION :

5. In order to appreciate above submissions, it is necessary to turn to the text of the Rule 173Q which reads as under :

> "173Q. Confiscation and penalty. - (1) Subject to the provisions contained in section 11AC of the Act and sub-rule (4) of rule 57-I and sub-rule (5) of rule 57U, if any manufacturer, producer, registered person of a warehouse or a registered dealer -
>
> (a) --------
> (b) --------
> (bb)---------
>
> (bbb) enters wilfully any wrong or incorrect particulars in the invoice issued for the excisable goods dealt by him with intent to facilitate the buyer to avail of credit of the duty of excise in respect of such goods which is not permissible under these rules ; or
>
> (c) ----------
>
> (d) contravenes any of the provisions of these rules with intent to evade payment of duty,
>
> then all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty not exceeding three times the value of the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) or clause (bb) or clause (bbb) or clause (c) or clause (d) has been committed, or five thousand rupees, whichever is greater.

CONSIDERATION :

6. So far as Rule 173Q(bbb) is concerned it contemplates incorporation of wrong or incorrect

particulars wilfully in the invoice issued for the excisable goods dealt with by the manufacturer with intent to facilitate the buyer to avail of credit of the duty of excise in respect of such goods which is not permissible under the Central Excise Rules, 1944.

7. There is no material on record even remotely to suggest that at any point of time the respondent - assessee has issued any invoice of the goods dealt with by it in favour of any of its customers muchless entered wilfully any wrong or incorrect particulars in the invoice issued for the excisable goods to its customers with intent to facilitate the buyer to avail any benefit of excise duty in respect of the goods which is not permissible under the Central Excise Rules. In our view, mere filing of the classification list and mentioning wrong heading of classification or claiming benefit under wrong heading cannot be said to be within the sweep of the Rule 173Q(bbb). Hence, the submission made by Mr.Desai in this behalf has no merit. The same is unsustainable.

8. So far as second submission based on sub-rule (d) of Rule 173Q is concerned, sub-rule contemplates contravention of any of the provisions of the Rules with intent to evade payment of excise duty. It is no doubt true that the tribunal has recorded findings that the

intention behind giving a wrong heading in the classification was with intent to evade payment of duty. It was, therefore, necessary for Mr.Desai to point out any rule saying wrong reference to the heading of classification amounts to breach of the provisions of the Act or Rules. Mr.Desai could not put his finger on any of the rules so as to bring the act of the respondent - assessee within the sweep of that rule so as to hold breach of sub-rule (d) of Rule 173Q(d). In this view of the matter, the second submission advanced by Mr.Desai is also misplaced and without any merit.

CONCLUSION :

9. In the aforesaid view of the findings recorded by us, we do not see any fault with the view taken by the Tribunal while setting aside the penalty imposed by the authorities below.

10. In the result, application is dismissed with no order as to costs.

(V.C. DAGA, J.)

(J.P. DEVADHAR, J.)